

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2003-000137-001 DT (consol.)

06/16/2003

LC2003-000138-001 DT

HONORABLE MICHAEL D. JONES

CLERK OF THE COURT
P. M. Espinoza
Deputy

FILED: _____

LARRY A WILSON JR.

ROBERT G ROBINSON

v.

JOHN DALE BURKHOLDER (001)
GLENDALE CITY PROSECUTORS OFFICE
(001)

NANCY L KHIEL
CARLA J BASTIEN
PEORIA CITY PROSECUTOR
JOHN P TATZ

GLENDALE CITY COURT
PEORIA CITY COURT
HONORABLE GEORGE ANAGNOST
PEORIA CITY COURT
8401 W MONROE STREEET
PEORIA AZ 85345
HONORABLE JOHN BURKHOLDER
GLENDALE CITY COURT
5711 W. GLENDALE
GLENDALE AZ 85301

MINUTE ENTRY

This case is a consolidated Special Action filed by Petitioners¹, after the trial judges (Respondents herein) denied their request for a jury trial for misdemeanor crimes² designated “domestic violence”, in violation of A.R.S. Section 13-3601. This Court found that the issue presented in this Petition for Special Action is a matter of state-wide concern and of particular

¹ This action is a consolidation of two special actions. The Peoria City Court consolidated the cases of Petitioners Scott Johnson, Thomas Rye, and Ryan Simmons to determine the issue of jury eligibility. Likewise, Glendale Municipal Court consolidated the cases of Petitioners Larry Wilson Jr. and Arnulfo Cervantes-Espinoza for the same issue. Both groups of petitioners are consolidated for ruling on this issue.

² Each petitioner is charged with misdemeanor assault under A.R.S. Section 13-1203, except Rye, who is charged with misdemeanor criminal damage under A.R.S. Section 13-1602. However, both offenses are grouped together when alleged as domestic violence cases under A.R.S. Section 13-3601.

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importance to Petitioners, as well as the limited jurisdiction courts throughout Maricopa County, and has accepted jurisdiction of this case pursuant to the Arizona Constitution Article VI, Section 18.

Petitioners contend they have a right to a jury trial for the misdemeanor crimes of assault and criminal damage as designated “domestic violence”, pursuant to A.R.S. Section 13-3601. In this Special Action, they assert the United States Constitution, the Arizona Constitution, and Arizona case law support their position. While the first two issues do not present novel questions to this court, there does not appear to be any reported cases in Arizona dealing with the broad issue of jury eligibility for misdemeanor offenses designated under state domestic violence statutes. Recently, in State ex rel. McDougall v. Strohson³, the Arizona Supreme Court held there was no right to a jury trial in misdemeanor domestic violence assault cases when considering the impact of a Federal Statute potentially banning one convicted of a domestic violence related crime from ownership of a firearm. Although McDougall is relevant and applicable to the present case, it did not discuss the total extent of consequences provided under Arizona law that might raise the offense from a “petty” crime, which does not recognize the right to a jury trial, to a “serious” crime, which recognizes jury eligibility. In addition to firearms, Petitioners have listed seven factors they insist elevate the offense to “serious” status: mandatory counseling, mandatory booking, misdemeanor compromise, order of protection, child custody, fingerprint records, and employment clearances.

The Federal law is not helpful in regard to this issue. The United States Constitution requires that if a crime is punishable by more than six (6) months of incarceration, it is not a petty offense and the accused must be afforded the right to a jury trial.⁴

Arizona has in fact, extended the right of a jury trial much further than that guaranteed by the United States Constitution.⁵ Petitioners cite Article II, Section 23⁶ of the Arizona Constitution for the proposition that, when the Constitution was adopted, the right to trial by jury existed upon demand in all criminal cases. This argument is misguided because Arizona case law clearly establishes this right for “serious” rather than “petty” offenses.⁷ In making this determination the Arizona Supreme Court in McDougall⁸, listed four factors to evaluate in determining the right to a jury trial in the State of Arizona. The first three factors are found in Rothweiler v. Superior Court⁹:

³ 190 Ariz. 120, 945 P.2d 1251 (1997).

⁴ Lewis v. United States, 518 U.S. 322, 116 S.Ct. 2163, 135, L.Ed.2d 590 (1996); Blanton v. North Las Vegas, 489 U.S. 538, 109 S.Ct. 1289, 103 L.Ed.2d 550 (1989).

⁵ State ex rel. McDougall v. Strohson, 190 Ariz. at 120, 945 P.2d at 1251.

⁶ Providing in relevant part that the right to trial by jury shall remain inviolate.

⁷ State ex rel. Dean v. Dolny, 161 Ariz. 297, 778 P.2d 1193 (1989).

⁸ State ex rel. McDougall v. Strohson, 190 Ariz. at 124-25, 945 P.2d at 1255-56.

⁹ 100 Ariz. 37, 410 P.2d 479 (1966).

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1. The length of possible incarceration;
2. Its relationship to common law crimes.
3. The moral quality of the act charged (sometimes referred to as the “moral turpitude” issue;

The fourth consideration comes from Dolny¹⁰ and requires that the Court evaluate whether additional serious or grave consequences might flow from the conviction.

The length of possible incarceration in this case is six (6) months imprisonment, which is the maximum possible sentence for all class one misdemeanors, and the maximum fine is \$2500.¹¹ This factor is not controlling as defendants charged for other class 1 misdemeanors such as child abuse¹² or disorderly conduct¹³ are not entitled to trials by jury.

At common law, misdemeanor assault was the equivalent of simple battery, and it did not require a jury trial.¹⁴ Noting that Arizona has never extended the right to jury trial to misdemeanor assault cases, the Arizona Supreme Court in McDougall, followed suit with crimes designated under domestic violence, A.R.S. Section 13-3601, which include misdemeanor assault and criminal damage.¹⁵ The Supreme Court cited State v. Schackart¹⁶ and State v. Sirny¹⁷ for the proposition that A.R.S. Section 13-3601 is a procedural statute that does not create a separate offense of domestic violence nor change the underlying substantive charge.¹⁸

An evaluation of the moral quality of the act charged requires this Court to consider whether domestic violence related offenses involve “moral turpitude”, or alternatively, whether additional serious or grave consequences might flow from one’s conviction.¹⁹ Acts of “moral turpitude” are those which “adversely reflect on one’s honesty, integrity, or personal values.”²⁰ Examples include indecent exposure²¹, solicitation of prostitution²², perjury²³, forgery²⁴, and

¹⁰ 161 Ariz. 297, 778 P.2d 1193.

¹¹ A.R.S. Section 13-802(A).

¹² Bazzanella v. Tucson City Court, 195 Ariz. 372, 988 P.2d 157 (1999).

¹³ State ex rel. Baumert v. Superior Court, 127 Ariz. 152, 618 P.2d 1079 (1980).

¹⁴ Bruce v. State, 126 Ariz. 271, 614 P.2d 813 (1980); Goldman v. Kautz, 111 Ariz. 431, 531 P.2d 1138 (1975); O’Neill v. Mangum, 103 Ariz. 484, 445 P.2d 843 (1968).

¹⁵ State ex rel. McDougall v. Strohson, 190 Ariz. at 122-23, 945 P.2d at 1253-54.

¹⁶ 153 Ariz. 422, 737 P.2d 398 (App. 1987).

¹⁷ 160 Ariz. 292, 772 P.2d 1145 (App. 1989).

¹⁸ State ex rel. McDougall v. Strohson, 190 Ariz. at 123-24, 945 P.2d at 1254-55.

¹⁹ Benitez v. Dunevant, 198 Ariz. 90, 95, 7 P.3d 99, 104 (2000).

²⁰ State ex rel. Dean v. Dolny, 161 Ariz. at 300 n.3, 778 P.2d at 1196 n.3.

²¹ City Court of Tucson v. Lee, 16 Ariz. App. 449, 494 P.2d 54 (1972).

²² In re Koch, 181 Ariz. 352, 890 P.2d 1137 (1995).

²³ Harris v. State, 41 Ariz. 311, 17 P.2d 1098 (1933).

²⁴ Id.

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fraud.²⁵ Misdemeanor offenses that do not involve “moral turpitude” include selling liquor to a minor²⁶, child abuse²⁷, animal cruelty²⁸, disorderly conduct²⁹, and most notably, simple assault³⁰ and assault designated as domestic violence.³¹ The court in Benitez shed some light in distinguishing offenses involving “moral turpitude” from those that lack it:³²

It may be said that each crime enumerated [those listed above lacking “moral turpitude”] implicates the offender’s personal values, but not necessarily his moral deficiencies. Moral turpitude is implicated when behavior is morally repugnant to society. It is not implicated when the offense merely involves poor judgment, lack of self-control, or disrespect for the law involving less serious crimes.

Thus, while misdemeanor assault and criminal damage designated under domestic violence reflect Petitioners personal values, they do not reflect crimes involving dishonesty, fraud or a deficiency of moral character.

Addressing the second part of the moral quality test, Petitioners list eight potentially additional consequences of conviction, which they contend are sufficiently grave and serious to warrant a jury trial.³³ Resolution of this issue requires this Court to consider any additional statutory penalties that may result from a conviction of designating the offenses charged under domestic violence as compared to simple assault and criminal damage. It is important to base an analysis of jury eligibility on the offense charged, and not on the individual defendant.³⁴

The Arizona Supreme Court, in McDougall, has already rejected Petitioners’ claim that a potential ban on the ownership and use of a firearm is a sufficiently grave consequence to warrant a jury trial for domestic violence assault.³⁵ The court also appears to reject Petitioners’ claim that sufficiently grave consequences would result if they could not obtain employment or

²⁵ In re Wines, 135 Ariz. 203, 660 P.2d 454 (1983).

²⁶ Spitz. v. Municipal Court of Phoenix, 127 Ariz. 405, 621 P.2d 911, 914 (1980).

²⁷ Bazzanella v. Tucson City Court, 195 Ariz. 372, 988 P.2d 157.

²⁸ Campbell v. Superior Court, 186 Ariz. 526, 924 P.2d 1045 (1996).

²⁹ State ex rel. Baumert v. Superior Court, 127 Ariz. 152, 618 P.2d 1079.

³⁰ Goldman v. Kautz, 111 Ariz. at 433, 531 P.2d at 1140.

³¹ State ex rel. McDougall v. Strohson, 190 Ariz. at 120, 945 P.2d at 1251.

³² Benitez v. Dunevant, 198 Ariz. at 95, 7 P.3d at 104.

³³ See supra.

³⁴ Benitez v. Dunevant, 198 Ariz. at 96, 7 P.3d at 105; State ex rel. McDougall v. Strohson, 190 Ariz. at 125, 945 P.2d at 1256.

³⁵ 190 Ariz. at 125-26, 945 P.2d at 1256-57.

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are suspended from jobs requiring Class I or Class II fingerprint clearance.³⁶ Comparing Spitz³⁷ with Dolny³⁸, the court stated:

[T]he effect on defendant's [Petitioners'] employment more closely aligns with the sanction in *Spitz* than in *Dolny*. Here, in contrast to *Dolny*, defendant will not be subject to employment conditions such as counseling, testing or treatment. Moreover, a drug possession conviction potentially could prevent a defendant from getting any job, whereas prohibiting a defendant from possessing a gun would only potentially affect employment opportunities in limited areas [as in *Spitz*].³⁹

In accordance with the Arizona Supreme Court's reasoning in McDougall, this Court concludes that the potential employment consequences that may result from a domestic violence related conviction do not sufficiently show universally grave consequences that would warrant a jury trial. Like the defendant in Spitz, Petitioners will not be subject to employment conditions such as counseling⁴⁰, testing or treatment. Also, in contrast to Dolny, prohibiting Petitioners from employment requiring class I or class II fingerprint clearance illustrates the notion discussed in Spitz and McDougall that only a limited number of job areas are affected. Nonetheless, Petitioners' claim that their domestic violence crimes are serious and substantial in terms of potential employment consequences fails because the same result would occur with or without the domestic violence designation.⁴¹ Neither simple assault nor criminal damage offenses recognize such grave consequences that would permit a jury trial.⁴² As a result, I cannot accept the assertion that designating the offenses as "domestic violence" creates any additional grave or serious consequences that would warrant a jury trial.

Petitioners cite A.R.S Section 13-3601 for the proposition that a defendant arrested for a domestic violence offense must be booked into jail, while one charged with any other misdemeanor crime, may be cited and released.⁴³ Although the cite and release provisions do not apply to domestic violence related crimes⁴⁴, Section 13-3601 clearly states that the only time

³⁶ A.R.S. Sections 41-1758.03(C), (G). Examples of jobs include school teachers, A.R.S. Section 15-534, and childcare workers, A.R.S. Section 41-1964.

³⁷ Spitz v. Municipal Court, 27 Ariz. at 408, 621 P.2d at 914 (holding that suspending Spitz' liquor license was not a sufficiently grave consequence to justify a jury trial, even though the result would prevent him from working in liquor sales).

³⁸ State ex rel. Dean v. Dolny, 161 Ariz. at 300, 778 P.2d at 1196 (holding that a conviction for possession of marijuana warranted a jury trial because sufficiently grave consequences existed).

³⁹ State ex rel. McDougall v. Strohson, 190 Ariz. at 122, 945 P.2d at 1253.

⁴⁰ Mandatory counseling is a condition of conviction, not employment. A.R.S. Section 13-3601.01.

⁴¹ A.R.S. Sections 41-1758.03(C), (G) (categorizing domestic violence no different than assault and criminal damage).

⁴² See *supra*.

⁴³ A.R.S. Sections 13-3903, 13-3883.

⁴⁴ A.R.S. Section 13-3601.

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an officer shall make an arrest is if the case involves either physical injury or the threatening use or discharge of a dangerous instrument, and the officer does not have reasonable grounds to believe that the victim will be protected from further injury given the circumstances at the time. Notably, in all other situations involving misdemeanor offenses and domestic violence related offenses, a police officer may, at his discretion, decide whether or not to arrest and hold an offender.⁴⁵ The resulting anomaly that flows from Petitioners' arguments is exactly what our courts have sought to avoid: situations where one individual is entitled to a jury trial, while another, charged with the same substantive offense, is not.⁴⁶ For example, by applying A.R.S. Section 13-3601 to misdemeanor assault designated as "domestic violence", an offender who commits assault but does not use a dangerous instrument or cause physical injury⁴⁷, is not subject to mandatory arrest and detention even if the officer at the scene reasonably believes the victim will not be safe from future harm.⁴⁸ However, an offender who commits assault by threatening another with a knife must be arrested and detained if the arresting officer reasonably believes the victim will not be safe from future harm.⁴⁹ On the same facts, a third situation provides that this offender is not subject to mandatory arrest and detention if his assault is not designated as involving domestic violence. It follows from Petitioners argument—mandatory booking is a sufficiently grave consequence attached to domestic violence offenses to warrant a jury trial—that offenders one and two are entitled to a jury trial while offender three is not. Because I determine jury eligibility based on an analysis of the offense charged, and misdemeanor assault remains the same substantive offense when designated as "domestic violence", this Court cannot accept the inconsistent results that would follow from adopting Petitioners' argument.

Petitioners' next contentions involve orders of protection⁵⁰ and child custody hearings.⁵¹ If a court grants an order of protection against Petitioners, they may be restrained from both the use and possession of their homes, and contacting or coming near the residence, workplace, or school of the victim.⁵² This order, which attaches to a person convicted of a "domestic violence offense", also applies to one who may commit an act of domestic violence.⁵³ Even if the court finds that a domestic violence offense has been committed, in a hearing for an order of protection, the court must also find "reasonable cause to believe that physical harm may otherwise result" in order to restrain the offender from the aforementioned activities.⁵⁴ Therefore, it makes no difference whether or not a person has been convicted or accused of

⁴⁵ A.R.S. Sections, 13-3601(B), 13-3903.

⁴⁶ State ex rel. McDougall v. Strohson, 190 Ariz. at 125, 945 P.2d at 1256.

⁴⁷ A.R.S. Section 13-1203.

⁴⁸ A.R.S. Section 13-3601(B).

⁴⁹ *Id.*

⁵⁰ A.R.S. Section 13-3602.

⁵¹ A.R.S. Section 25-403.

⁵² A.R.S. Section 13-3602(G).

⁵³ *Id.*

⁵⁴ Even here, however, the accused may return to the residence in order to retrieve belongings if accompanied by a law enforcement officer. A.R.S. Section 13-3602(G).

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domestic violence; a finding of reasonable cause for future domestic violence incidents is the controlling language for the consequences Petitioners cite.

Similarly, a domestic violence conviction is not required in order for the court to grant a parent sole custody of a child in a custody hearing.⁵⁵ In fact, a finding of domestic violence only temporarily affects one's chance of obtaining joint or sole custody.⁵⁶ A parent will be permitted visitation rights as long as the court finds that "visitation will not endanger the child or significantly impair his emotional development."⁵⁷ Analogous to an order of protection, the grave consequence of not being able to visit one's child, attaches to the potential for future physical or mental harm, not conviction. Furthermore, this Court cannot accept Petitioners' argument because the child custody provision affects only those with children, and I may not take into account individual defendants when considering the potential grave consequences.⁵⁸

Petitioners' remaining claims that grave and serious consequences might flow from their possible convictions are not persuasive and do not require substantial consideration by this Court. Petitioners cite State v. Larson⁵⁹ for the proposition that a grave and serious consequence results for a defendant who is not permitted to compromise his charge under domestic violence without the prosecutors recommendation.⁶⁰ This assertion is weakened by the fact that the general compromise statute also applies to non-domestic violence assault, and therefore, Petitioners are not subject to any additional consequences.⁶¹

As a final point, this Court does not accept Petitioners' contention that mandated counseling and fingerprinting are sufficiently grave consequences of conviction to warrant a jury trial. Counseling programs serve the purpose of rehabilitation, not punishment.⁶² In addition, A.R.S. Section 41-1750 provides for the mandatory fingerprinting of a person convicted of domestic violence related offenses. The significance of this provision is discounted for the fact that it applies to other non-jury misdemeanors such as unlawful imprisonment⁶³, and it does not prevent police officers from taking one's fingerprints for any other misdemeanor.

For all of the reasons previously discussed, this court concludes that the trial courts did not err in denying Petitioners' request for a trial by jury.

⁵⁵ The court looks predominantly to the best interests of the child. A.R.S. Section 25-403.

⁵⁶ A.R.S. Section 25-403(B), (H).

⁵⁷ Id.

⁵⁸ Benitez v. Dunevant, 198 Ariz. at 96, 7 P.3d at 105; State ex rel. McDougall v. Strohson, 190 Ariz. at 125, 945 P.2d at 1256.

⁵⁹ 159 Ariz. 14, 764 P.2d 749 (1988) (holding that crimes involving domestic violence are not subject to the general compromise statute).

⁶⁰ A.R.S. Section 13-3981(B).

⁶¹ Id.

⁶² A.R.S. Section 13-3601.01.

⁶³ Amancio v. Forster, 196 Ariz. 95, 993 P.2d 1095 (1999).

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IT IS THEREFORE ORDERED DENYING all relief as requested by the Petitioners herein.

IT IS FURTHER ORDERED terminating any and all stay orders in these cases with instructions to the various Respondent Courts to schedule these cases for bench trials within 60 days of this order.

/s/ HONORABLE MICHAEL D. JONES

JUDICIAL OFFICER OF THE SUPERIOR COURT